My reading of paragraph (5) as emphasised is that it merely refers to a cause of action in the original pleading in which relief has already been claimed. It does not either expressly or by implication prevent any amendment by adding or substituting a new relief. In this particular case, to allow an amendment only to the cause of action without allowing a similar amendment to the new relief will not serve any purpose. A fortiori when the latter is incidental to the former. Relief means a remedy sought by a plaintiff in an action. A cause of action is simply a factual situation the existence of which entitles a plaintiff to obtain from the Court a remedy against the defendant. (See Diplock L.J. in *Letang* v. *Cooper*).[3] There must be a cause of action before a plaintiff can claim a relief in an action. (See Order 15 rule 1 RHC 1980). I am therefore in agreement with Abdul Hamid Ag. L.P. for reasons stated above. Relief is part and parcel of a new cause of action and in fact ancillary to it. In my view, it is just and proper for the Judge in the Court below to grant the respondents leave to amend the statement of claim after the expiration of the limitation period as provided in rule 5 paragraph (2) by allowing the addition of a new cause of action and also new reliefs that flow from it. The appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Yeo & Yeo; Chew Biman & Co.*

ZAINAL ABIDIN v. CENTURY HOTEL SDN. BHD.

[S.C. (Abdul Hamid Ag. L.P., Seah & Syed Agil Barakbah S.C.JJ.) March 25, 27 & September 20, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 47 of 1986]

Landlord and Tenant – Lease – Breach of tenancy agreement – Wrongful termination – Damages – Option for renewal – Whether enforceable – National Land Code, s.240(2).

In this case the respondent had entered into a tenancy agreement in writing with the appellant whereby the respondent sublet the third floor of the hotel containing 17 rooms to the appellant for a period of three years from November 1, 1980 at a monthly rent of $12,000 together with $2,000 per month for water and electricity supplies. The respondent decided to close down the hotel and ordered the appellant to stop operating the recreation or health centre run by him on the premises let to him. The appellant brought an action for breach of the tenancy agreement and claimed damages. The learned trial judge gave judgment for the appellant and awarded the agreed damages of $67,300. She however dismissed the claim for loss of profits for the remaining 27 months of the lease and the claim for loss of profits for the renewal lease period of 36 months. The appellant appealed against the judgment dismissing the claim for those items of damages and the respondent cross-appealed on liability.

Held: (1) in this case the respondent had evinced a clear intention to determine and put an end to its obligations under the tenancy agreement and therefore the cross-appeal must be dismissed;

(2) the option clause as in the lease in this case did not give rise to any legal obligations on the part of either party unless and until the lessee gives notice in writing to the lessor, within the stipulated period, of his intention to extend the lease and the parties have mutually agreed to the new rent. In this case none of the conditions had been complied with and therefore the learned Judge was right to make no award under this head;

(3) in this case having regard to the finding of the learned Judge that the appellant's agent had deliberately underdeclared his gross income to the Customs Department since the commencement of the business, a fair sum to be awarded as damages would be the additional sum which the appellant was ordered to pay to the Customs Department. The appellant should therefore be awarded $47,000 as damages for loss of profits.

Cases referred to:

(1) *King's Motors (Oxford) Ltd.* v. *Lax & Anor.* [1969] 3 All E.R. 665.

(2) *Smith* v. *Morgan* (1971] 2 All E.R. 1500, 1504.

SUPREME COURT.

G. Sri Ram (*Manjit Singh* with him) for the appellant.

Raja Abdul Aziz Addruse (*Tang Kien Onn* with him) for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): The respondent operated a hotel called Abad Century Hotel at No. 32-34, 2½ mile, Jalan Kelang, Kuala Lumpur until it was closed down on August 30, 1981. On September 6, 1980 the respondent entered into a tenancy agreement in writing with the appellant whereby the respondent sublet the third floor of the hotel containing seventeen rooms (hereinafter called the demised premises) to the appellant for a period of three years with effect from November 1, 1980 at a monthly rent of $12,000/– and a further agreed payment of $2,000/– per month for water and electricity supplied to and consumed in the demised

premises. The appellant duly went into possession and operated a recreation or health centre in the demised premises in accordance with the term of the tenancy agreement. This the appellant continued to do so until August 7, 1981 when the security guards engaged by the respondent prevented the appellant and his partner from gaining access to the demised premises. On August 10, 1981 the respondent addressed a letter marked as Ex. P5 to the appellant in the following term, *viz.*

"Re *Closure of Century Hotel*

We wish to advise you that the hotel will cease operation as at 30.8.81. You are here given notice of termination of your Health Centre operation with effect from the above date.

May we thank you for your service rendered. '

This prompted a reply from the appellant's solicitors on August 11, 1981 and the relevant part reads:

"With effect from August 7, 1981 you have denied our client the use and quiet enjoyment of the demised premises and have by your conduct, evinced an intention not to perform your obligations under the lease and have thereby wrongfully repudiated the contract contained in the said lease. By your acts you have rendered it impossible for our client to carry on the business for which the premises were leased and have totally evicted our client from the demised premises. Consequently, our client hereby treats you as having put an end to the contract contained in the lease, reserving his right forthwith to sue for damages for breach of the essential terms of the lease. In any event, he will not be paying rent to you for future months."

On November 11, 1981 solicitors for the respondent sent a letter to the appellant's solicitors demanding the appellant to remove all his properties from the demised premises and if he should fail to do so by November 16, 1981, the respondent would take immediate step to have them taken away and charge him for the costs and expenses properly incurred thereby. Moreover, the keys to the demised premises had been returned and accepted by the respondent.

Apart from these documentary evidence the learned judge found that prior to August 7, 1981 the respondent had already considered closing the hotel and a number of informal discussions was held with the tenants of the respondent. The appellant was represented by his partner PW4 at these meetings. It was then made known to the tenants that if the respondent should decide to cease operating the hotel it wanted all the tenants to vacate from their demised premises peaceably so that their businesses would not be affected too adversely. The learned judge held that proposals for payment of compensation were discussed but no agreement appeared to have been reached, at least with the appellant.

Now, when the respondent sent Ex. P5 to the appellant requesting him to stop operating the recreation or health centre in the demised premises as from August 30, 1981, this was in breach of one of the covenants of the tenancy agreement. And if a distinct refusal by the respondent to perform one part of it goes to the root of the tenancy agreement, goes to the foundation of the whole, the appellant, in our opinion, was entitled to conclude that the respondent no longer intended to be bound by the terms of the tenancy agreement in the future. Whether or not this wilful breach amounted to a determination of the tenancy agreement is in our opinion a question of mixed law and fact. On the facts we therefore agree with the finding of the learned judge that after the respondent had resolved to close down the Abad Century Hotel and had ordered the appellant to stop operating the recreation or health centre as from August 30, 1981 onwards the conduct of the respondent evinced a clear intention to determine and to put an end to its obligations under the tenancy agreement [see section 240(2) of the National Land Code 1965]. The cross-appeal therefore fails.

We turn now to consider the appeal of the appellant which was confined only to damages.

In his statement of claim the appellant originally was asking the total sum of $5,077,682.25 as damages made up of ten items. At the trial, he abandoned five items, three items amounting to $67,300/– were agreed and only the remaining two items were in dispute. These two disputed items were:

(a) loss of profits at $64,000/– per month for 27 months	$1,728,000.00
(b) loss of profits for the renewed lease period of 36 months at $64,000/– per month	$2,304,000.00

The learned judge awarded no damages on item (b) apparently on the ground of remoteness. As regards item (a) the learned judge seemed to treat the claim in the nature of special damages and as the appellant had failed to prove it satisfactorily, she made no award under this head.

For convenience, we would deal with item (b) first.

The option clause in the tenancy agreement reads:

"The Lessor will on the written request of the Lessee made two (2) months before the expiration of the term hereby created grant to the Lessee a further term of three (3) years from the date of the said expiration *at a rent to be agreed upon* but containing the same covenants and provisions with the exception of this clause PROVIDED HOWEVER that the Lessee shall not then be in a breach of any of the terms and conditions herein expressed to be observed or performed by the Lessee." (Emphasis given)

A similar clause came up for decision in *King's Motors (Oxford) Ltd.* v. *Lax & Anor.*[1] Burgess V-C held that an option in a lease for a further term "at such rental as may be agreed upon between the parties" was, at least, where there was no relevant arbitration clause, void for uncertainty, in the absence of agreement between the parties. *King's Motors case* was considered by Brightman J. in *Smith* v. *Morgan.*[2]

In our opinion, an option clause (like the one here) in a lease does not give rise to any legal obligations on the part of either party unless and until the Lessee gives notice in writing to the Lessor, within the stipulated period, of his intention to extend the lease *and* the parties have mutually agreed to the new rent. Until these two conditions are satisfied the option clause, in our judgment, could not be legally enforced against the Lessor. Applying this to the facts of this case, it is plain that none of the conditions had been complied with and it follows that the learned judge was right to make no award under this head. This ground of appeal therefore fails.

Next, we consider the question whether the learned judge was right to reject the summary of accounts for the period from January 1, 1981 to July 30, 1981 marked as Ex. P13 in which the appellant appeared to be basing his claim for the sum of $1,728,000/– for alleged loss of profits at $64,000/– per month for 27 months from August 1981 to October 1983.

It was conceded that Service Tax is payable on 5% of the gross receipts and the following Service Tax was charged and paid by the appellant based on the undermentioned monthly returns submitted by an employee of the appellant to the Customs Department:

Month	Gross Receipts	Service Tax
Nov 80	$7,850.80	$392.54
Dec 80	$8,340.80	$417.04
Jan 81	$8,574.80	$428.74
Feb 81	$8,430.60	$421.53
Mar 81	$8,632.60	$431.63
Apr 81	$9,130.80	$456.54
May 81	$9,370.80	$468.54

However, for the months of June and July 1981 the monthly gross receipts submitted suddenly shot up to $180,715.60sand $149,146.70 and the Service Tax payable was $9,035.83 and $7,457.34 respectively. It is to be noted that the returns for the month of July 1981 was submitted by Tai Yoon Onn, a partner of the appellant. As a result of these grave discrepancies, the Customs Department ordered an examination to be carried out into the account books. Following this departmental investigation, additional Service Tax and penalties were assessed amounting to $46,877.45 which was made up as follows:

Month	Gross Receipts	Gross Receipts & Service Tax	Difference	Penalty
Nov 81	$143,366.00	$7,108.30	$ 6,739.56	$1,482.70
Feb 81	$157,352.53	$7,857.60	$ 7,446.07	$1,489.21
Mar 81	$175,514.00	$8,775.70	$ 8,344.07	$1,501.93
Apr 81	$175,389.00	$8,769.45	$ 8,312.91	$1,330.07
May 81	$178,428.00	$8,921.40	$ 8,452.86	$1,183.40
			$39,295.47	$6,987.31
			$ 6,987.31	
			$46,282.78	
Aug 81	$ 11,893.40	$ 594.67 (due)	$ 594.67	
			$46,877.45	

Ex. P13 was apparently based on these figures. However, the Chartered Accountant PW5 who prepared this statement frankly admitted under cross-examination that this was not an audited account and that no audit had been carried out on the books. No reason had been put forward by the appellant why an audit was not ordered. It was adumbrated that since the Service Tax Branch of the Customs Department had investigated into the account books of the appellant's business, there was no need to have another audit. With respect, we do not agree. In our opinion, a government departmental investigation is quite different from an audit properly carried by a qualified accountant. Be that as it may, in cross-examination the appellant said:

"... For 1981, the profit was $600,000/– net before payment of tax. My share would be 60% of that amount, *i.e.* $360,000/–. I have received my share of the profits. Mr. Tai handed over all daily collections to me. All the 1981 collections have been handed to me. I do not have any evidence to show that I had received the money from Tai. The profits for 1981 have been distributed to the partners. The total amount of profits I drew was about $300,000/– in 1981. I have no evidence to show that I had drawn this amount. There were cheques. Tai issued to

me personally. I do not have these cheques. I have no income tax returns."

It was not surprising that the learned judge rejected Ex. P13 as a true statement of accounts and we would have done the same having regard to the nature of the evidence adduced before the trial court. On this finding, it seems to follow that the learned judge also rejected the returns submitted for the months of June and July 1981 for the purposes of computing Service Tax. We think the inflated figures were inserted in order to boost the claim of the appellant against the respondent. Without Ex. P13 there was no credible evidence to support the claim of the appellant for loss of profits at $64,000/- per month or the claim of $1,728,000/- under item (a). That however, was not the end of the matter. The appellant's claim against the respondent was substantially one for wrongful determination of the tenancy agreement. Under the terms of this agreement the respondent covenanted to sublet the third floor of the Abad Century Hotel to the appellant for a fixed period of 3-year commencing on November 1, 1980, for the sole purpose of operating a recreation or health centre only. The appellant was ordered by the respondent to cease operating the business with effect from August 30, 1981 after having managed it for ten months. And there were still twenty-six more months to run. At page 16 of her judgment the learned judge found that since the start of the business the appellant's agent had been underdeclaring the gross income of the recreation centre when submitting the monthly returns to the Customs Department for the purpose of computing the Service Tax. As a result of some investigation carried out by the Customs Department the Service Tax payable by the appellant was readjusted upwards. This amounted to $46,877.45 inclusive of penalties.

In the judgment the learned judge did not make any specific finding as to the amount of the under-declared gross income. Nor did the appellant adduce any evidence to support this finding. However, the onus was on the appellant to prove his case and he had a corresponding duty to mitigate his economic loss. In the context of this case, in our opinion, since the Customs Department had imposed an additional Service Tax and penalties of $46,877.45 on the appellant based on statements of accounts which had been rejected by the trial judge and confirmed on appeal by this court, we think that having regard to the finding of the learned judge that the appellant's agent had deliberately underdeclared his gross income to the Customs Department since the commencement of the business, a fair sum to be awarded as damages would be the additonal sum which the appellant was ordered to pay to the Customs Department. We therefore set aside that part of the judgment of the learned judge in which she made no award and substitute therefor the sum of $47,000.00 as damages for loss of profits. Consequently, we amend the figure in the judgment from $67,300.00 to $114,300.00. Save for this adjustment, both the appeal and cross-appeal are dismissed. As regards costs we order that the respondent pay to the appellant one-half of the taxed costs of this appeal. The deposit to be refunded to the appellant.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar; Ariff & Co.*

BROWN & ROOT (LABUAN) SDN. BHD. v. PADA SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) April 29 & October 1, 1986]

[Kota Kinabalu – Supreme Court Civil Appeal No. 354 of 1985]

Equity – Constructive trust – Frustrated contracts – Unjust enrichment – Defective pleadings – Civil Law Act, 1956, s. 15.

Contract – Frustrated contract – Unjust enrichment – Civil Law Act, 1956, s. 15.

In this case the appellants owned a piece of land on which were six units of bungalows. They entered into an agreement whereby the respondents agreed to buy and the appellants agreed to sell the property. Payment was to be made in two lump sums. The first payment of $190,000 was paid on the date of execution and the balance was to be paid on or before November 31, 1983. Vacant possession of the bungalows was to be given on the execution of the memorandum of transfer on November 31, 1983. However the appellants gave vacant possession of the bungalows to the respondents before the execution of the memorandum of transfer. The agreement provided that in the event of the agreement becoming impossible of performance due to acts of the Government, the appellants shall on demand by the respondents refund all the monies received under the agreement. The land and bungalows were acquired by the Government and the respondents gave notice of the revocation of the agreement and requested for the refund of $190,000. In their defence the appellants admitted the respondent's claim but claimed a set-off for rentals received by the respondents. It appeared that the respondents had allowed Sacon Construction Sdn.